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Henry Early v. Karl L. Jackson : Appellant's Reply to Respondent's Petition for Rehearing

Utah Supreme Court

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7725

Case No. 7725

IN THE SUPREME COURT
of the
STATE OF UTAH

HENRY EARLEY,

Respondent,

vs.

KARL L. JACKSON,

Appellant.

APPELLANT'S REPLY TO RESPONDENT'S PETITION FOR REHEARING

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STATEMENT

Plaintiff and Respondent has filed a Petition for Rehearing and in support thereof has submitted a Brief in which is set forth three points claimed to be error of the Supreme Court in its decision heretofore rendered justifying a rehearing. While Appellant does not believe that either of the points raised are supported by the record and the law applicable in this case, he further contends that the matters raised by Respondent have nothing to do with the Court's decision and therefore

this Brief is submitted as an answer to the claims made so that the Court will be fully advised in the matter when considering the Petition for Rehearing filed herein.

Appellant in answer to the arguments of Respondent submits the following points as being determinative:

POINTS

1. The Court did not base its decision on the fact that the driver of Appellant's truck was confronted with an emergency.

2. The question of the negligence of the driver of Appellant's truck was not involved in the Court's decision.

3. The Court did not misconstrue either the facts or the law in concluding that Respondent was guilty of contributory negligence as a matter of law.

ARGUMENT

1. THE COURT DID NOT BASE ITS DECISION ON THE FACT THAT THE DRIVER OF APPELLANT'S TRUCK WAS CONFRONTED WITH AN EMERGENCY.

The sole question which Appellant raised in his appeal to the Supreme Court was whether the Plaintiff as a matter of law was guilty of negligence which contributed to the accident. In making this argument it was necessarily conceded that Appellant's negligence is not an issue in the case. However, the argument contained Petition for Rehearing brief in support thereof, as well as the original Brief filed herein, repeatedly attempts to throw the emphasis of the case upon the issue of whether Defendant's driver was guilty of negligence which proximately caused the accident. We again wish to point out

to the Court that that question is not involved except to determine whether such negligence was the *sole* cause of the accident. Nor did the Court in its decision attempt to exonerate the Defendant from any claimed negligence. The question was, and is, whether the Plaintiff, Henry Earley, was guilty of contributory negligence. The Court points this out in the first paragraph of its opinion wherein it is stated:

> "Appellant contends that its motion for a Judgment notwithstanding the verdict should have been granted because the evidence shows as a matter of law that Respondent was guilty of contributory negligence which proximately caused the accident."

In outlining the issue to be resolved by the Supreme Court the opinion further states that Respondent apparently concedes that he was negligent in parking the truck in the place and in the manner in which it was parked and in running down the north side of the highway, but "contends that it was a jury question as to whether this contributory negligence was the proximate cause of the accident or whether Appellant's negligence was the sole proximate cause." In resolving this issue in favor of Appellant, the Court finally concludes:

> "His (Respondent's) negligence which continued up to the very impact was the direct cause of the accident, and nothing intervened between it and his injury to make it only a remote cause thereof."

Whether or not there was a conflict in the testimony as to the driver's ability to see Respondent's truck until

he was from within 250 feet to 300 feet away or whether the driver of Appellant's vehicle saw Respondent's truck at all is not material insofar as the question of Respondent's negligence is concerned. Regardless of whether the driver of Appellant's truck saw or did not see Respondent's vehicle on the highway it is without dispute that Respondent parked the truck on the highway with the headlights facing toward the northwest across the highway and not along the road in the direction from which the oncoming truck driven by Appellant's driver was proceeding. Further, Respondent was aware that the Appellant's vehicle was approaching when it was at least a half mile away. The question thus resolves itself to one of whether the Respondent acted reasonable under all of the circumstances, considering all that transpired from the moment he stopped his truck on the highway and proceeded to park the same at right angles covering the entire lane for east bound traffic until he saw the approaching vehicle and ran toward it instead of getting out of the way.

Whether or not there was a question of fact with respect to the time when the driver of Appellant's truck saw or should have seen the Respondent's vehicle, such would have no bearing on the Court's decision for the reason that insofar as this case is concerned the negligence of Appellant's driver is apparently recognized and therefore any dispute on the evidence with respect to his negligence would not make any difference in the result obtained. The question is not whether the driver of Appellant's vehicle was confronted with an emergency

so as to relieve Appellant from liability but whether Respondent was aware of a situation which he had by his own acts created so that his subsequent conduct was negligence on his part which would bar his recovery.

The Court did not excuse Appellant's driver from his conduct but did, by its decision, place some of the responsibility upon the Respondent where under all the circumstances it properly lay. Insofar as Respondent's conduct is concerned he was not justified in assuming that Appellant's driver, proceeding along the highway on the right hand portion thereof would see Respondent's truck parked across that portion of the hard surface of the highway reserved for east bound traffic and bring his vehicle to a stop without turning the same from its course of travel to the north portion of the highway in order to go around such parked vehicle. Inasmuch as Respondent attempted to proceed down the north half of the roadway, well knowing that Appellant would have to use that portion of the highway in order to avoid striking Respondent's vehicle, we submit that Respondent was negligent as a matter of law contributing to his own injury. We do not contend, as does Respondent, that the negligence of one party was the sole proximate cause of the accident, but we do contend that the negligence of the Respondent was a contributing cause of the accident.

2. THE QUESTION OF THE NEGLIGENCE OF THE DRIVER OF APPELLANT'S TRUCK WAS NOT INVOLVED IN THE COURT'S DECISION.

What has been said under the preceding point like-

wise is applicable to the argument presented in response to the position taken in Respondent's brief under point 2. The comment by the Court in its opinion to the effect that the driver of Appellant's car was not able to determine "until he was within 250 or 300 feet of the parked truck that it was obstructing the entire lane of his side of the traffic" is consistent with the law and the facts in the case. Even though we assume that under the statute Appellant's driver was required to see the parked vehicle at a distance of 350 feet, it is nevertheless apparent that such driver under the circumstances here presented would not instantaneously be able to recognize the danger, but it would take at least a moment, during which the vehicle would continue to travel, in order to react to the situation and proceed to turn to the north to pass the vehicle on the other portion of the highway. As stated by the Court in its opinion, "Respondent, by blocking the lane to eastbound traffic made it mandatory for any such traffic which wished to pass by to go into the north lane."

The issue which the Court resolved was not whether Appellant's driver was or was not negligent in failing to see the position of Respondent's car until he was from 300 feet to 250 feet away (or even less), but whether Respondent himself was negligent when, realizing that an approaching car would have to proceed on to the north portion of the highway to pass, nevertheless proceeded to run along such north portion toward the approaching car, at no time stopping or turning out to avoid a collision with such vehicle. The fact, if it be a

fact, that the driver of Appellant's truck should have been able to stop before reaching the parked vehicle merely begs the question insofar as relieving Respondent of responsibility for his conduct.

3. THE COURT DID NOT MISCONSTRUE EITHER THE FACTS OR THE LAW IN CONCLUDING THAT RESPONDENT WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

In connection with this point, Respondent apparently seeks to argue that had Appellant's truck continued on its course on the south portion of the roadway there would have been no impact between it and the Respondent. The physical evidence showed that there was no abrupt swerving of the Appellant's automobile but that the brake marks continued in a diagonal line from the south toward the north crossing on to the north portion of the roadway. At no time did those marks reach the north edge of the roadway until at a point approximately where the parked truck was located. Thus it would appear as a matter of law that Respondent was not traveling down the north edge of the roadway but was running down the north half of the roadway somewhere between the middle and the north edge. While the Supreme Court did not hold that Respondent deliberately ran into the course of the oncoming vehicle it nevertheless did state that "he was fully aware of the danger which he had created of a collision with his truck and yet he placed himself in the very path where the approaching truck would have to travel to avoid such collision and ran towards the truck thereby giving the driver little time

to avoid hitting him after his lights would reveal his presence, when he could have avoided all danger to himself by running on one of the shoulders of the highway where he knew passing vehicles would be unlikely to travel."

The foregoing statement of the Court succinctly states the position heretofore advanced by Appellant in his appeal to the effect that the conduct of the Respondent contributed to the accident and resulting injury. In holding that the Respondent placed himself in a position where he knew Appellant's truck would have to go if it were to pass the truck parked on the highway, the Court thereby determined that as a reasonable man the Plaintiff was required to expect that the driver of the approaching vehicle, upon observing the parked truck on the highway, would turn out to pass.

This conclusion is certainly supported by the testimony of the respondent himself, as reflected on page 145 of the Record. At the risk of being repetitious, we quote the testimony as follows:

"Q. Now, Mr. Earley, you knew that this car, in order to get around your car, would have to get over on the north half of the highway, didn't you?

A. Yes, sir.

Q. You knew that and appreciated it at the time, didn't you?

A. Yes, sir.

Q. And yet knowing all of that in your attempts to extricate yourself from this predicament

you had put yourself in, you went down the north half of that highway? Isn't that right?

A. Yes, sir.

Q. Right in the face of that oncoming automobile, isn't that correct?

A. Yes, sir."

With respect to the position that respondent occupied on the highway, he also testified on cross examination (R. p. 150):

"Q. Now you did go down there waving your arms, isn't that correct?

A. Yes, sir.

Q. And it is your present memory that you were on the oiled portion of the highway at all times, isn't that so?

A. I would say so, yes, sir.

Q. And your present idea about it is that you were in that half of the highway somewhere which was north of the middle lane?

A. Yes, sir."

Respondent further contends that even assuming Appellant's truck would have to turn to the left to avoid a collision, nevertheless, "there was certainly no reason to expect that it would suddenly swerve from the south side of the highway clear over to the north edge of the paved road to avoid a vehicle which was 140 feet distant." We submit that there is no evidence in the record to the effect that Appellant's truck did swerve suddenly from the south side of the highway to the north side. Respond-

ent claims that the brake marks "zig-zagged back and forth across the highway," citing page 186 of the Record. What the witness Johnson actually testified to was that the tracks of the car appeared as testified to by the "former witness." The former witness was the highway patrolman Reese who stated that the brake marks started at a point approximately 100 feet west of the culvert and "then they gradually went up this way until right approximately at this point they went off the road." (R. p. 165)

It is a common fault of individuals to attempt to relieve themselves of responsibility by attempting to shift the entire burden upon the other party. This, apparently, has been the strategy in the instant case because Respondent repeatedly has avoided answering for his own misconduct by attempting to shift the responsibility on to the Appellant. We can only state in this respect that for every claimed act of negligence on the part of the Appellant there is conversely a like failure on the part of the Respondent to act reasonably under all of the circumstances.

Respondent has not challenged the Court's statement to the effect that it is conceded that respondent was negligent so that the only question for determination on appeal is whether such negligence, as a matter of law, proximately contributed to the injury received by him. This being so, the cases cited by Appellant heretofore clearly support the position taken by the court in reaching its decision.

As pointed out in the court's opinion the original stage was set by the negligence of Respondent in park-

ing the truck upon the highway in a position across the traffic lane for east bound traffic; in turning off the motor so that the truck could not be moved immediately in the event of approaching vehicles; in leaving the truck in this position while he attempted to remove the offal from the back of the truck; and then when Appellant's truck did approach by further injecting himself into the act in getting off the truck and running towards the approaching vehicle waving his arms. This clearly demonstrates Respondent's state of mind—that he had been guilty of gross carelessness in doing what had been done —so that he now attempted to correct the situation by further involving himself. He ran directly toward the approaching vehicle in the direction from which it was approaching and never attempted to turn out before being struck by it.

CONCLUSION

In conclusion we call the Court's attention to the fact that even though Respondent was injured, such fact does not entitle him to recover in this case. Respondent's attempt to influence the court by his concluding statement that if the decision of the Supreme Court is allowed to stand "respondent will have nothing for his pain, suffering and injuries," sounds more like an impassioned plea to the jury and may have been the cause of obtaining a verdict in the trial of the case. Certainly this Court is above being affected by such remarks. If he was engaged in the course of his employment at the time of the injury, Respondent may have a claim under the Workmen's Com-

pensation Act which does not require "fault" as a basis of recovery, nor does it permit "contributory negligence" to affect the employee's right to compensation. But in attempting to collect damages from Appellant, the law is clear that the parties will be left where they are if the negligence of both contributed to cause the injuries and damage.

We respectfully submit that the evidence adduced at the trial shows as a matter of law that Respondent contributed to cause his own injury and that the decision heretofore rendered by this Court to that effect should not be disturbed. The Petition for Rehearing should be denied.

Respectfully submitted,

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